

United Steelworkers of America Local 1013 and USS, Division of USX Corporation. Case 10-CB-5517

February 28, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On August 16, 1990, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, finding,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United Steelworkers of America Local 1013, Fairfield, Alabama, its officers, agents, and representatives, shall take the action set forth in the Order.

¹ In adopting the judge's finding that Joseph Langford is an 8(b)(1)(B) representative, Member Devaney finds it unnecessary to rely on the judge's finding that Langford is "often the only management representative on the entire shift."

Keith Jewell, Esq., for the General Counsel.

Kirk Gonzales, Esq., of Birmingham, Alabama, for the Respondent.

S. G. Clark, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on June 4, 1990, at Birmingham, Alabama. The hearing was held pursuant to a complaint filed by the Regional Director for Region 10 of the National Labor Relations Board (the Board) on January 20, 1990, and is based on a charge filed by the Charging Party, USS, Division of USX Corporation (the Employer or the Charging Party) on December 8, 1989, and alleges that United Steelworkers of America Local 1013 (the Respondent or the Union) has violated Section 8(b)(1)(B) of the National Labor Relations Act (the Act) by accepting and processing internal union charges against Joseph A. Langford because he gave testimony to the Employer regarding alleged work infractions by a bargaining unit employee. Respondent Union has by its answer filed on February 23, 1990, denied the commission of any violations of the Act.

On the entire record in this proceeding, and after consideration of the briefs filed by the General Counsel, counsel for the Charging Party, and counsel for the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that the Employer was, and has been, at all times material, a Delaware corporation, with an office and place of business located in Fairfield, Alabama, where it is engaged in manufacturing steel and steel products; that during the past calendar year prior to the filing of the complaint, a representative period of all times material, the Employer sold and shipped from its Alabama facility finished products valued in excess of \$50,000 directly to customers located outside the State of Alabama; and that the Employer is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent Union admits, and I find that the Union is and has been, at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent Union is certified to represent the Employer's employees at its Fairfield, Alabama facility. The Union and the Employer are parties to a collective-bargaining agreement which provides for temporary upgrade of certain bargaining unit employees to vicing foreman. Joseph Langford, a bargaining unit employee and a union member, has been serving as a vicing foreman since 1984 with limited intermittent periods of return to his bargaining unit position. As a vicing foreman Langford has the responsibility for overseeing the work of approximately 32 steel production employees who are members of his bargaining unit, and responsibly directs their work, reassigns them to other unit positions as required, and directs them to work overtime or to report in as required. He also adjusts their pay as required to account for errors. He also handles verbal complaints by the men concerning their pay and working conditions and decides whether to satisfy the complaints or to deny the complaint verbally. If the employees disagree with his decision, they may file a written grievance through the contractual grievance machinery. Langford does not serve as management's representative in the formal grievance procedure and the labor agreement prevents him from doing so. Langford also possesses the authority to shut down the entire operation if he deems it necessary, and can send an employee home for misconduct.

In the instance giving rise to this case, Langford testified that on October 28, 1989, a machine was in need of repair and he put out a call over the loudspeaker in the plant for two repairmen assigned to fix machinery in the plant as required. Repairman D. A. Henderson did not respond and Langford went to the control room and located him there. The machine had been down for 30 minutes by that time. He told Henderson he had been calling him and Henderson said

he could not hear him because he had turned off the loudspeaker in the control room because he was tired of listening to it. Langford explained at the hearing that it is necessary to leave the loudspeakers on as electronic repairmen are called constantly and that it may be necessary for an electronic repairman to assist in cases of injuries. At that time Henderson went on to repair the piece of equipment that was down and Langford reported it to Henderson's supervisor. Langford also wrote the matter up on his hourly report. Langford was subsequently called as a witness by the Charging Party and testified to the above event involving Henderson at a section 8,B hearing under the terms of the grievance procedure relating to suspension and discharge cases.

On November 29 or 30, 1989, Langford received a letter from the Union dated November 28, 1989, signed by Recording Secretary Michael S. Balough, which stated as follows:

The Local Union met on November 27, 1989 and charges were filed by D. A. Henderson, and these charges will be read at the next regular meeting on December 11, 1989.

The letter also included a copy of the handwritten charges filed by Henderson which alleged a violation of section 1, paragraphs (a), (d), (e), and (g) of the Union's constitution by Langford "By attempting to bring about the withdrawal from the Local 1013 a member in good standing through discharge from the company . . . By falsely reporting to company & Local members at a 8-b hearing." He subsequently received on December 19 or 20, 1989, another letter from the Union's recording secretary informing him that the charges had been read at the regular union meeting on December 1, 1989, that a trial committee had been appointed at the meeting and a hearing was scheduled to be held on January 10, 1990, at 9:30 a.m. Union President Richard Jones testified that the trial committee meeting was held with witnesses appearing. The Respondent's February 5, 1990 union meeting minutes reflect with respect to this charge that "under the advice of attorneys . . . we will not pursue charges any further." The minutes also reflect that a grievance was filed against having vicing foremen with a motion to do away with vicing foremen, made, seconded, and carried, and that vicing foremen were discussed. Union President Richard Jones testified that a hearing was held after the trial committee was appointed and some witnesses came, that Langford did not appear and the matter was sent to the International Union and the Union received a letter from the International Union and the trial committee was informed it could not pursue the matter. The trial committee was disbanded.

The letter from the International Union was read into the record and stated in part:

Be advised, in accordance with the resolution of the International Executive Board concerning appeals and procedures, the charges filed on the above-referenced subsections are not enforceable and should not be entertained.

Union President Jones testified that the case was thus dropped. It is undisputed that Langford was never notified of the decision to drop the charges against him.

Analysis

The General Counsel contends that Langford is a 2(11) supervisor with 8(b)(1)(B) duties as he possessed grievance adjustment and collective-bargaining responsibilities protected by Section 8(b)(1)(B) of the Act which provides:

It shall be an unfair labor practice for a labor organization or its agents:

(1) to restrain or coerce . . . (b) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances

The General Counsel points out that Langford is often the only supervisor when he works the 3 to 11 p.m. or 11 p.m. to 7 a.m. shifts with 36 to 28 employees under his supervision, is responsible for payroll, makes adjustments to both the pay rate and the number of hours to be paid to employees, has the authority to resolve pay disputes and, when unable to do so, refers the employees to their union representative to file a written grievance, has the authority to assign employees to lesser paying jobs, has the authority to resolve disputes over working conditions, has the authority to shut down the mill if necessary, and has the authority to direct employees to work overtime, to leave early, or to call out additional employees. On the basis of the above-cited responsibilities, the General Counsel contends that Langford possesses grievance adjustment and collective-bargaining responsibilities protected by Section 8(b)(1)(B) citing *Operating Engineers Local 101 (St. Louis Bridge)*, 297 NLRB 485 (1989), for the proposition that the above-enumerated matters "are exactly the types of disputes that would most likely be contractual grievances under the collective bargaining agreement." The General Counsel contends, "It makes no difference whether the disputes are oral or written." The General Counsel also relies on the language of Section 6(c) of the complaint and grievances procedure which provides as follows:

Any employee who believes that he has a justifiable complaint may discuss the complaint with his supervisor, with or without the grievance or assistant grievance committeeman being present, as the employee may elect, in an attempt to settle same. However, any such employee may instead, if he so desires, report the matter directly to his grievance or assistant grievance committeeman and in such event the grievance or assistant grievance committeeman can refer it to Step 1 by completing a Complaint Form, on forms furnished by the Company, which shall among other items include the signatures of the committeeman and the employee.

The General Counsel further contends that Langford was cited to appear before the trial committee because of his 8(b)(1)(B) and related duties because when the charges were accepted, Respondent's president, Richard Jones, "knew that Langford was a vicing foreman and had been involved in a prior charge against Respondent" and that Jones "claimed that citing Langford to appear before the trial committee focused, in part, on his alleged failure to abide by the terms of the collective-bargaining agreement." Union President Jones testified in response to cross-examination questions,

that some of the membership were unhappy with the manner in which vicing foremen are utilized and that the Charging Party's method of using vicing foremen was in violation of the agreement. Based on this testimony, the General Counsel contends that the actions were taken against Langford because he testified at the 8,B grievance hearing concerning the incident with Henderson and because of "Langford's refusal to agree with the interpretation of section 2-A.4.d of the contract pertaining to his testifying as a witness at a Sec. 8,B hearing which led to the acceptance and maintenance of charges against him." The General Counsel states in his brief that the Board "has long held that a union violates Section 8(b)(1)(B) when actions against a supervisor-member are rooted in a dispute between the employer and the union over the interpretation of the collective bargaining agreement," citing *Sheet Metal Workers Local 80 (Limbach Contractors)*, 285 NLRB 386 (1987), and contends further that "a union may not infringe upon the employer's right to select its collective-bargaining representative by using measures to impose the union's interpretation of the collective bargaining agreement on the employer's representative." The General Counsel further contends that the Union's citing of Langford to appear before the trial committee "was a clear attempt to gain control over Langford and to make him a representative of the Respondent, rather than a representative of management," in violation of Section 8(b)(1)(B), citing *Operating Engineers (Stone & Webster)*, 283 NLRB 734 (1987), and at 295 NLRB 223 (1989). The General Counsel further contends that the summoning of Langford before the trial committee on the charges made by Henderson was violative of Section 8(b)(1)(B) notwithstanding that no other actions were taken against him as "Respondent's acts constituted restraint and coercion of the Charging Party in the selection of its representative within the meaning of Section 8(b)(1)(B) of the Act," citing *Operating Engineers (Stone & Webster)*, supra. The General Counsel concludes that "Because Respondent's actions against Langford were caused by his interpretation and administration of the collective-bargaining agreement with respect to the disciplining of Henderson, Langford was cited to appear before the trial committee for behavior that occurred while he was engaged in 8(b)(1)(B) duties—that is, 'collective bargaining or grievance adjustment, or . . . any activities related thereto,'" citing *NLRB v. Electrical Workers Local 340 (Royal Electric)*, 481 U.S. 573 (1987), citing approval of the Board's decision in *Typographical Union (Northwest Publications)*, 172 NLRB 2173 (1968), which held a union violated Section 8(b)(1)(B) "by attempting to compel the employer's supervisor to take pro-union positions when interpreting the collective bargaining agreement by citing him to appear before their executive committee."

The Respondent contends that not all supervisors are covered by Section 8(b)(1)(B) as that section protects only those employer representatives engaged in activity involving collective bargaining or grievance adjustment and that in *Florida Power & Light Co. v. Electrical Workers*, 417 U.S. 790 (1974), the Supreme Court concluded that Section 8(b)(1)(B) protects only those supervisors who actually perform 8(b)(1)(B) duties. The Respondent further relies on *NLRB v. Electrical Workers IBEW Local 340 (Royal Electric)*, 481 U.S. 573 (1987), in which the Supreme Court stated (at 581–582, citing *Florida Power*, supra at 417 U.S. 804–805):

Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the selection of its representatives for the purpose of collective bargaining and grievance adjustment. The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjustor or collective bargaining on behalf of the employer.

The Respondent thus contends that the Supreme Court in *Florida Power* concluded that a restrictive adverse effect test is the appropriate standard to use in determining when Section 8(b)(1)(B) is violated. Respondent also relies on *Carpenters District Council of Dayton (Concourse Construction)*, 296 NLRB 492 (1989), in which the Board in reliance on *Florida Power* held "a supervisor must actually possess grievance adjustment or collective-bargaining responsibilities: 'One simply cannot discern whether discipline will have an adverse impact on a supervisor members's future performance of 8(b)(1)(B) duties when their existence is purely hypothetical.'" Respondent also contends that the adverse effect test will be satisfied "only when an employer-representative is disciplined for behavior that occurs while he or she is engaged in Section 8(b)(1)(B) duties," citing *Electrical Workers IBEW Local 340 (Royal Electric)*, supra, *American Broadcasting Co. v. Writers Guild*, 437 U.S. 411 (1978), which held that union discipline must adversely affect the supervisors conduct in his capacity as a grievance adjustor or collective bargainer.

In reliance on the foregoing cases, the Respondent contends that Langford was not a company-representative within the meaning of Section 8(b)(1)(B) as he is not a company representative for the purpose of grievance adjustment.¹ Respondent points to the parties collective-bargaining agreement which distinguishes between a complaint in which Langford may become involved as the supervisor and a grievance for which Langford is not involved by the terms of the grievance procedure and by his own testimony. The Respondent reviews several examples of employee problems which the Charging Party has authorized him to handle such as ensuring the accuracy of payments for actual hours worked, job assignments, calling in workers or requiring overtime, ensuring that employees did not work in unsafe conditions, and relieving an employee from work for the remainder of the shift for alleged misconduct. Respondent points out that although any of the above examples could produce a complaint which would become a grievance, Langford's resolution of these problems was not the "particular and explicitly stated activity" of grievance adjustment citing *Florida Power*, 417 U.S. at 803. Respondent also contends that this case is distinguishable from the line of cases in which there was no collective-bargaining agreement and supervisor-members were held to be 8(b)(1)(B) supervisors because they handled day-to-day problems similar to those handled by Langford, citing *St. Louis Bridge Contractor Co.*,

¹ It should be noted that there was no evidence presented that Langford was engaged in collective bargaining on behalf of the Employer.

supra. Respondent further notes that in the instant case the collective-bargaining agreement defines grievances and Langford was not authorized to act as a company representative in such cases. Respondent notes that if Langford is unable to resolve a pay dispute by referring to his records and observing a clerical error which he can then correct, he refers the employee to the Union to file a grievance.

Subsequent to the submission of briefs in the instant case, the Board issued its decision in *Sheet Metal Workers Local 68 (DeMoss)*, 298 NLRB 1000 (1990). In this case the Board discussed the test under the Act for determining whether supervisors possess 8(b)(1)(B) authority. The Board noted that *Electrical Workers Local 340* requires the application of “a more stringent test than the Board formerly applied to determine whether members whom a union disciplines are employer representatives within the meaning of Section 8(b)(1)(B) and to define more narrowly the circumstances in which an 8(b)(1)(B) violation will be found on the basis of union discipline of individuals who are both union members and 8(b)(1)(B) representatives.” The Board then found the project manager and superintendents who had been subjected to union discipline and fined, did possess authority to adjust grievances within the meaning of Section 8(b)(1)(B). The Board found that the superintendents had the initial responsibility and authority to settle jobsite problems if they could. The project manager testified that the superintendents dealt with the union job steward regarding jobsite problems. There was also testimony that the superintendents had dealt with jurisdictional disputes. The Board found that the resolution of jurisdictional disputes are “almost invariably raised in the context of jurisdictional provisions of collective-bargaining agreements” and thus a superintendent would be representing his employer in the adjustment of a grievance. The Board also stated at 298 NLRB at 1003, 1004 that:

[T]he fact that superintendents resolve grievances at a fairly low level—before they become either particularly memorable or subject to the formalities of higher steps of the grievance procedure—does not mean that the superintendents are not resolving grievances as that term is used in Section 8(b)(1)(B). As the Supreme Court has observed in another context, “there is unlikely to be a bright-line distinction between an incipient grievance, a complaint to an employer, and perhaps even an employee’s initial refusal to perform a certain job that he believes he has no duty to perform.”² An important interest that Congress was protecting in Section 8(b)(1)(B) was an employer’s interest in having an individual of its own choosing to represent it in dealings with the union that represents its employees. The employer’s need for uncoerced representation of its interests is of great importance at the level at which grievances first arise, since the employer’s preferred interpretation of the contract could be effectively thwarted by a jobsite representative who “resolved” grievances simply by agreeing to whatever the union’s job steward proposed. Thus, the view that no real grievance adjustment within the meaning of Section 8(b)(1)(B) could occur until a dispute reached the level of a formal meeting between an employer representative and the

Respondent’s business agent simply ignores the realities of the workplace.

Applying the Board’s holding and rationale in *Sheet Metal Workers Local 68* to the facts of the instant case, I find that Langford is an 8(b)(1)(B) supervisor within the meaning of the Act. Initially he is clearly a 2(11) supervisor and operates with considerable authority and responsibility as the sole management representative on the 7 to 11 p.m. and 11 p.m. to 7 a.m. shifts. Although he does not represent the Employer in the formalized steps of the grievance procedure, he as the initial management representative to whom an employee raises a complaint and often the only management representative on the entire shift, of necessity deals with day-to-day problems or grievances raised by the employees, and resolves those problems or grievances as they arise whenever possible. Just as the resolution of jurisdictional disputes as were involved in the *Sheet Metal Workers Local 68* case are almost invariably raised in the context of jurisdictional provisions of a collective-bargaining agreement, so too are the various matters handled by Langford such as pay disputes, safety matters, job assignments, overtime, and the authority to call out employees, hold them for mandatory overtime, and to send employees home for misconduct. Moreover, the instance giving rise to the filing of charges against Langford involved his writeup and testimony concerning an employee’s misconduct which of necessity involved the representation of the employer at the initial stage (albeit informal) of the grievance procedure and his testimony at a hearing was an inevitable outcome of an unresolved dispute if the Employer were to have adequate representation in this case. I accordingly find that the acceptance and maintenance of charges against Langford constituted restraint and coercion of the employer within the meaning of Section 8(b)(1)(B) of the Act.

CONCLUSIONS OF LAW

1. USS, Division of USX Corporation is an employer within the meaning of Section 2(6) and (7) of the Act.
2. United Steelworkers of America Local 1013 is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent, Local 1013, violated Section 8(b)(1)(B) of the Act by accepting and maintaining charges against Joseph Langford filed by another union member because of Langford’s testimony at an 8(b) grievance hearing.
4. The above unfair labor practice is an unfair labor practice within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(b)(1)(B) of the Act by accepting and maintaining internal union charges against the Employer’s representative for the adjustment and handling of grievances, it is recommended that it cease and desist therefrom and take certain affirmative actions necessary to effectuate the policies of the Act including the rescission of the acceptance and maintenance of charges against Langford and the removal of all references in its minutes and records thereto and written notification to Langford and to the Charging Party that this has been done and that no further action will be taken against him as a result of the aforesaid charge and that an appropriate notice be posted.

² *NLRB v. City Disposal Systems*, 465 U.S. 822, 836 (1984).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, United Steelworkers of America Local 1013, Fairfield, Alabama, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing any employer in the selection of representatives for the purpose of adjustment of grievances, by accepting or maintaining internal union charges against those representatives, because of their role in the adjustment of grievances on behalf of the Employer.

(b) In any like or related manner restraining or coercing any employer in the selection of representatives for the purpose of the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the acceptance and maintenance of the aforesaid internal union charges against Joseph Langford and expunge all references in its meeting minutes and records thereto and notify Joseph Langford and the Charging Party in writing that this has been done and that no further action will be taken against him as a result of the aforesaid charges or because of his role as an employer representative for the adjustment of grievances.

(b) Post at its business office and its meeting halls copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to

members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by USS, Division of USX Corporation, if willing, at all places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain or coerce any employer in the selection of representatives for the purposes of adjustment of grievances, by accepting and maintaining internal union charges against those representatives, because of their role in the adjustment of grievances on behalf of the Employer.

WE WILL NOT in any like or related manner restrain or coerce any employer in the selection of representatives for the purposes of the adjustment of grievances.

WE WILL rescind the acceptance and maintenance of the aforesaid internal union charges against Joseph Langford and expunge all references in our meeting minutes and records thereto and notify Langford and USS, Division of USX Corporation in writing that this has been done and that no further action will be taken against him as a result of the aforesaid charges because of his role as an employer representative for the adjustment of grievances.

UNITED STEELWORKERS OF AMERICA
LOCAL 1013

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."